IMBANGAN UTAMA SDN BHD

v.

LOTAN ENGINEERING WORKS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES WINDING UP NO: D1-28-828-2000]
28 JANUARY 2002

COMPANY LAW: *Winding-up - Petition - Acknowledgement of indebtedness - Acknowledgement executed by director of respondent - Whether sufficient proof of debt - Whether petition to be allowed - Companies Act 1965, ss. 218(1)(e), (2)(a) - Companies (Winding-Up) Rules 1972, rr. 26, 194*

The petitioner had petitioned for the winding-up of the respondent based on two acknowledgements of indebtedness executed by a director of the respondent. The respondent did not deny to executing the acknowledgements, but raised the preliminary objections that: (i) the affidavit verifying petition, being dated the same date as the petition, had contravened r. 26 of Companies (Winding-up) Rules 1972 ('the Rules'); and (ii) the petitioner's affidavit in reply, being filed 17 days late, ought to be disregarded by the court. This apart, the respondent also argued that *non est factum* applied to the petition herein.

Held:

[1] Bearing in mind r. 194 of the Rules, and the principle that the court must not only take into account the prejudice to the interest of the applicant who seeks the cure but also the interest of the other parties and the interest of upholding the due administration of civil justice in general, and further that the court, in the absence of prejudice, may discount "any error, defect or irregularity", the preliminary objections herein are overruled. (p 500 a-b)

[2] The petition ought to be allowed as it is beyond question that the acknowledgement of indebtedness in both the respective sums was signed by an authorized officer of the company. (p 500 e-f)

[3] The onus rests heavily on the party who alleges *non est factum. Inter alia*, the signer must establish his lack of competence due to illness or innate capacity or defective education and he was not negligent or had acted nonchalantly or with want of care, and he must further establish that he had thought that he was signing a document which was so radically different in substance or in kind from the document signed. (p 501 a-b)

[3a] The respondent had not attempted to discharge any of the aforesaid onus. Hence, the respondent's plea of mistake or *non est factum* is no defence to avoid a clear admission of due execution of a document of indebtedness. (p 502 b)

[Petition allowed.]

Case(s) referred to:

Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(foll)***
Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***
Chin Yoon Timber Co v. Overseas Lumber Bhd [1978] 2 MLJ 173 ***(refd)***
Goh Jong Cheng v. MB Melwani Pte Ltd [1991] 1 MLJ 482 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(foll)***
Lim Tok Chiow & Anor v. Dian Tong Credit & Development Sdn Bhd [1994] 4 CLJ 155 HC ***(refd)***
Mahkota Technologies Sdn Bhd v. BS Civil Engineering Sdn Bhd [2000] 7 CLJ 280 HC ***(refd)***
Malaysia Assurance Alliance Bhd v. Yeam Sai Meng & Ors [1996] 5 MLJ 345 HC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Ming Lian Corporation Sdn Bhd v. Hj Noordin [1974] 1 MLJ 52 ***(foll)***
Nicholls v. Nicholls [1997] 147 NLJ 61 ***(foll)***
Norwich and Peterborough Bldg Soc v. Steed (No 2) [1993] 1 All ER 330 ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 MLJ 157 ***(refd)***
Petelin [1975] 132 CLR 355 ***(refd)***
Polygram Records Sdn Bhd v. Hillary Ang & Ors [1994] 3 CLJ 806 HC ***(refd)***
Re Imperial Guardian Life Assurance Society [1869] (Vol IX) 447 ***(refd)***
Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver and Liquidation of Mosbert Acceptance Ltd [1978] 1 MLJ 57 ***(refd)***
Saunders v. Anglia Building Society [1971] AC 1004 ***(foll)***
UMW Industries (1985) Sdn Bhd v. Kamaruddin Abdullah & Anor [1989] 2 CLJ 1278; [1989] 2 CLJ (Rep) 619 HC ***(foll)***
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e), (2)(a)
Companies (Winding-Up) Rules 1972, rr. 26, 194

For the petitioner - Cik Gnanamalar; M/s Zairina Loh & Wong
For the respondent - Yusrin Faidz Yusoff; M/s Faidz, Leong & Chong

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

This is an appeal against my decision on 30 October 2001 allowing the petitioner's petition under s. 218 of the Companies Act 1965 (the Act) to wind-up the respondent company. I would begin by stating the guiding principles governing such petitions. A winding-up court should not allow itself to be used by an intended litigant as a machinery for trying a common law action or as a short-cut alternative to suing under common law on an alleged debt due (see *Re Imperial Guardian Life Assurance Society* [1869] (Vol IX) p. 447 at 450). Yet, if it is crystal clear that such debt is due, for example, upon clear uncontroverted evidence or acknowledgement of indebtedness on a quantified or liquidated sum, it would waste the civil courts' valuable time to require that the claimant/petitioner first proceed under common law and secure judgment on the debt before proceeding to petition to wind-up the company. Indeed, such an approach would in effect render nugatory and purposeless, s. 218(1)(e) read in conjunction with s. 218(2)(a) of the Act.

Firstly, a preliminary objection was taken by the respondent, being that the affidavit verifying petition was affirmed on 28 September 2000, which was the same day as the date of the petition, in breach of r. 26 of the Companies (Winding-Up) Rules 1972 (the Rules). Counsel submitted that the key words are "must be sworn after and filed within four days" (see *Lim Tok Chiow & Anor v. Dian Tong Credit & Development Sdn Bhd* [1994] 4 CLJ 155 and *Chin Yoon Timber Co v. Overseas Lumber Bhd* [1978] 2 MLJ 173). I however decided to exercise my discretion under r. 194 of the Rules to overrule this preliminary objection as I am obliged to apply the principles laid down by the Federal Court in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 (which adopted the landmark ratio in the judgment of Lord Woolf MR in *Nicholls v. Nicholls* [1997] 147 NLJ 61). The principles being:

(i) Although under O. 2 r. 1(1) (the equivalent being r. 194 of the Rules) of the Rules of the High Court 1980, non-compliance with the rules of procedure is to be regarded as mere irregularity and not a nullity, the curative powers of the Court over such procedural irregularity must in the words of Lord Woolf MR, "be exercised in a way which in all the circumstances best reflects the requirements of justice". And, in determining this the court must not only take into account prejudice to the interests of the applicant who seeks the cure but also the interest of the other parties and the **interest of upholding the due administration of civil justice in general**.

(ii) In the absence of prejudice the court may discount 'any error, defect or irregularity whether in the decision or otherwise not affecting the merits or the jurisdiction of the court' – not to do so is to derogate from that discretion.

(iii) Thus, defects affecting merits or the jurisdiction of the court ought not to be cured in an exercise of discretionary power.

(See also *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 and *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd* [1996] 3 CLJ 51.) The respondent's counsel then applied for his 2nd and 3rd preliminary objections (b) and (c) to be withdrawn – which was allowed. He then proceeded with his other preliminary objection (d), namely, that the affidavit in reply by the petitioner (encl. 2B) was filed 17 days late on 13 December 2000 and should not be read at the hearing of the petition. This late filing was conceded by the petitioner's counsel, but he said this defect was waived by the respondent as they did not raise this issue in their subsequent affidavit, and in any event, the exclusion of encl. 2B would not affect the merits of the petition. I again overruled this preliminary objection under (d) by adopting principle (ii) above and invoking r. 194 of the Rules.

In the case at hand, the petition was based on s. 218(1)(e) and grounded on an acknowledgement of indebtedness dated 24 February 2000 for RM125,348.76 by fax (exh. 'LYH7' of encl. 2B) and a further acknowledgement dated 3 April 2000 for RM81,684.77 by letter signed by the director of the respondent company (exh. 'LYH8'). I had to allow the above petition as prayed as it is beyond question that the acknowledgement of indebtedness in both the respective sums was signed by an authorised officer of the company. This due execution of the acknowledgement was never denied or challenged and indeed, the second acknowledgement in the sum of RM81,684.77 was for a lesser amount because after the first acknowledgement the respondent paid a sum of RM43,663.99 into account (see *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5).

To resist the winding-up application, the respondent raised only two issues for this court's adjudication, namely:

(a) While the respondent company acknowledged that they had signed the acknowledgement of debt dated 3 April 2000, they pleaded *non est factum* as they said that they had signed same under mistake and "without knowledge that the joint survey was not conducted"; and

(b) The respondent company have a counterclaim against the petitioner "for loss due to the flooding of the mines".

On The First Contention

It really takes a litigant of unusual temerity or cheerful insouciance to register a plea of *non est factum*, for such plea rarely if ever succeeds. There is a whole pack of legal cards stacked against such plea. As a defence or a cause of action the onus rests heavily and onerously on the party who alleges *non est factum*. The signer must establish his lack of competence due to illness or innate incapacity or defective education and he was not negligent or had acted nonchalantly or with want of care (see *Saunders v. Anglia Building Society* [1971] AC 1004 HL). And, he must further establish that he had thought that he was signing a document which was so radically or fundamentally or basically or essentially different in substance or in kind from the document signed (see also *Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively known as "The Search") & Anor* [1994] 3 CLJ 806 and *Goh Jong Cheng v. MB Melwani Pte Ltd* [1991] 1 MLJ 482). The effect of the doctrine must be kept within a very narrow field of application (see *Saunders (supra)* and *Petelin* [1975] 132 CLR 355), and such plea is unlikely to be successful (see *Norwich and Peterborough Bldg Soc v. Steed (No. 2)* [1993] 1 All ER 330). It is also trite that if a man's signature on a document was obtained by fraud, or under the influence of mistake, or something of the kind, he may be able to avoid it up to a point – but not when it has come into the hands of one who has in all innocence advanced money on the faith of it being the signer's document, or otherwise has relied upon it as being the signer's document, as the latter had enabled it to be circulated by actually signing it. Thus, in a contest between the signer of a document and the innocent third party, the law has almost invariably chosen to prefer the latter.

The guiding principle which this court should adopt on this issue is as set out in *Malaysia Assurance Alliance Bhd v. Yeam Sai Meng & Ors* [1996] 5 MLJ 345, *UMW Industries (1985) Sdn Bhd v. Kamaruddin bin Abdullah & Anor* [1989] 2 CLJ 1278; [1989] 2 CLJ (Rep) 619, *Saunders v. Anglia Building Society* [1971] AC 1004, *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640, *Ming Lian Corporation Sdn Bhd v. Haji Noordin* [1974] 1 MLJ 52. In *UMW Industries (supra)* the *dicta* of Dato' Siti Norma Yaakob J (as she then was) is pertinent to quote, as follows:

> … he has only himself to blame as the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent.

In *Saunders (supra)* it was also held that:

> A person who signs a document and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor.

And therein, Lord Wilberforce went further to say:

> I would add that the onus of proof in this matter rests upon him (that is) to prove that he acted carefully, and not upon the third party to prove contrary.

Before me, the respondent had not attempted or even sought to discharge any of the aforestated onus. I would thus hold that the respondent's plea of mistake or of *non est factum* is no defence to avoid a clear admission of due execution of a document of indebtedness. In my view, this challenge to a winding-up order being made is not *bona fide* (see *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver and Liquidation of Mosbert Acceptance Ltd* [1978] 1 MLJ 57). As for the counterclaim, it is pertinent to note that until the date of hearing of the petition there was neither any notice of claim sent to nor suit filed against the petitioner pertaining to any tortious acts or for breach of agreement. It is trite that a counterclaim, if it exists, is a separate issue altogether especially where no claim has been filed by the petitioner under common law (see *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157 and *Mahkota Technologies Sdn Bhd v. BS Civil Engineering Sdn Bhd* [2000] 7 CLJ 280). Further, the respondent had not shown any term in the contract dated 16 September 1999 (as there were no such terms) which gave them a right of set-off or of defence (see *Mahkota Technologies Sdn Bhd (supra)*).

In the event, prayers (a), (b) and (c) of encl. 1 (the winding-up petition) was allowed by this court.